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No. 88-1503

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

NANCY BETH CRUZAN, by her parents and co-guardians LESTER L. and JOYCE CRUZAN,
Petitioners,

v.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, *et al.*,
Respondents.

On Writ of Certiorari to the Missouri Supreme Court

BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Is a State required under the United States Constitution to authorize court-appointed guardians to cause the death of their incompetent and dependent ward by denying her food and fluids when she is not terminally ill and there is no clear and convincing evidence of her intent?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. "PRIVACY" OR "AUTONOMY" PROVIDES NO MEANINGFUL JURIDICAL GUIDE TO A CLAIMED UNENUMERATED RIGHT TO END THE LIFE OF A DISABLED PERSON	4
A. Petitioners Claim A Consitutional Right To Affirmatively End The Life Of A Disabled Person Who Is Not Terminally Ill	4
1. The Fact That Nancy Cruzan Is Not Terminally Ill Distinguishes This Case From Precedents Governing The Choice Of Medical Treatment	4
2. Though Food and Fluids Are Fundamentally Different From Medical Treatment, Whether They Are Characterized As "Treatment" Is Irrelevant To This Case	7
B. A Claim to "Privacy" or "Autonomy" Cannot Justify Ending The Life of Nancy Cruzan	9
1. Ending a Human Life Requires Justification to Be Lawful	9
2. "Privacy" or "Autonomy" Has No Application Here That Can Justify Ending the Life of Nancy Cruzan	11

TABLE OF CONTENTS—Continued

	Page
II. BY VIRTUE OF THE FUNDAMENTAL, INALIENABLE RIGHT TO LIFE, NO ONE CAN HAVE A LEGALLY COGNIZABLE INTEREST OF THE KIND CLAIMED HERE TO END A HUMAN LIFE	15
A. The Inalienable Right to Life Is Protected By the Constitution	15
B. The Inalienability of Nancy Cruzan's Right to Life Bars This Court From Giving Any Legal Significance to a Claimed Private Interest to End That Life	19
CONCLUSION	23

TABLE OF AUTHORITIES

Cases:	Page
Bowers v. Hardwick, 478 U.S. 186 (1986)	12
Buck v. Bell, 274 U.S. 200 (1927)	15
Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 497 N.E.2d 626 (1986)	5
Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972)	5, 8
Coker v. Georgia, 433 U.S. 584 (1977)	9
Cruzan v. Harmon, 760 S.W.2d 409 (Mo. 1988)	*passim*
Enmund v. Florida, 458 U.S. 782 (1982)	10
Furman v. Georgia, 408 U.S. 238 (1972)	18
Griswold v. Connecticut, 381 U.S. 479 (1965)	12, 13, 14
Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U.S. 150 (1897)	18
In re Caulk, 125 N.H. 226, 480 A.2d 93 (1984)	6
In re Storar, 52 N.Y.2d 363, 420 N.E.2d 64, *cert. denied*, 454 U.S. 858 (1981)	21
In re Westchester Co. Medical Center, 72 N.Y.2d 517, 531 N.E.2d 607 (1988)	6
Jacobson v. Massachusetts, 197 U.S. 11 (1905)	15
John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971)	7
Martin v. Commonwealth, 184 Va. 1009, 37 S.E.2d 43 (1946)	17
McGowan v. Maryland, 366 U.S. 420 (1961)	18
Michael H. v. Gerald D., 109 S.Ct. 2333 (1989)	12
Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893)	17
Moore v. City of East Cleveland, 431 U.S. 494 (1977)	14
Morissette v. United States, 342 U.S. 246 (1952)	11
Palko v. Connecticut, 302 U.S. 319 (1937)	13, 14
Poe v. Ullman, 367 U.S. 497 (1961)	12
Rasmussen v. Fleming, 154 Ariz. 207, 741 P.2d 677 (1986)	7
Robinson v. California, 370 U.S. 660 (1962)	10
Roe v. Wade, 410 U.S. 113 (1973)	13, 14
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Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)	14

TABLE OF AUTHORITIES—Continued

	Page
Tison v. Arizona, 107 S.Ct. 1676 (1987)	9
Tune v. Walter Reed Army Medical Hosp., 602 F. Supp. 1452 (D.D.C. 1985)	6
Union Pacific Ry. v. Botsford, 141 U.S. 250 (1891)	14
Von Holden v. Chapman, 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982)	7
Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989)	14, 16
West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)	17
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	17
Statutes:	
Act of June 20, 1910, ch. 310, 36 Stat. 557	18
Act of June 16, 1906, ch. 3335, 34 Stat. 267	18
Act of February 22, 1889, ch. 180, 25 Stat. 676	18
Act of April 19, 1864, ch. 59, 13 Stat. 47	18
Act of March 21, 1864, ch. 37, 13 Stat. 32	18
Act of March 21, 1864, ch. 34, 13 Stat. 30	18
Mo. Rev. Stat. § 475.120.3 (1986)	21
Other Authorities:	
J.Q. Adams, *The Jubilee of the Constitution* (1839), *reprinted in* 6 J. of Christian Juris. 1 (1986)	18
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Alexander, *Medical Science Under Dictatorship*, 241 New Eng. J. Med. 39 (1949)	21
G. Amos, *Defending the Declaration* (1989)	16, 17
H. Arkes, *"Autonomy" and the "Quality of Life": The Dismantling of Moral Terms*, 2 Issues in Law and Medicine 421 (1987)	10, 11, 15
H. Arkes, *First Things: An Inquiry Into the First Principles of Morals and Justice* (1986)	10, 17, 20
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TABLE OF AUTHORITIES—Continued

	Page
Comment, *Hold On Courts: May a Comatose Patient Be Denied Food and Water*, 31 St. Louis U.L.J. 749 (1987)	7
Derr, *Nutrition and Hydration as Elective Therapy: Brophy and Jobes from an Ethical and Historical Perspective*, 2 Issues in Law and Medicine 25 (1986)	8
Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250 (1975)	22
Destro, *Quality-of-Life Ethics and Constitutional Jurisprudence: The Demise of Natural Rights and Equal Protection for the Disabled and Incompetent*, 2 J. Contemp. Health L. & Pol. 71 (1986)	*passim*
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J. Ely, *Democracy and Distrust* (1980)	13, 14
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TABLE OF AUTHORITIES—Continued

	Page
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BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Knights of Columbus is an international Catholic fraternal organization of 1.4 million members dedicated to advancing the ideals of charity, unity, fraternity, and patriotism through its activities around the world. While the Knights of Columbus engages in a broad range of social action programs aiding the sick, the handicapped, and the less fortunate, it devotes a considerable portion of its resources and volunteer effort to protect and strengthen the family and to promote pro-life values. Thus, the Knights have a long-standing, substantial interest in the issues presented in this case, and their par-

ticipation as *amicus curiae* will bring an important, and broader, perspective to bear.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1988, Nancy Cruzan cried after a Valentine's Day card sent by her nieces was read to her by her nurse. Tr. at 596.[2] She has "jumped" when scared by a loud noise. *Id.* at 602 ("Nancy about came out of the bed."). She has cried after family visits. *Id.* at 644 ("We have seen her looking very sad with tears streaming down her cheeks."). When her nurses joked with each other about their relative professional skills, she "snickered and . . . had a smile on her face." *Id.* at 649-50. She smiled—and her nurse thought she was about to laugh—when the nurse told her a funny story about the nurse's children and a skunk. *Id.* at 599-600.

These poignant facts about the present life of Nancy Cruzan bring into sharp relief the limits of our understanding of her disability and the dangers of the claimed right to end her life. For though Nancy Cruzan must be fed through a gastrostomy tube and has only very limited interaction with her environment, no one has contended that she is terminally ill. On the contrary, it is claimed that her disability, her limited "quality of life," can provide the legal justification for taking affirmative steps—withholding food and fluids—to end her life. Variously styled rights are alleged by the briefs of the Petitioners and their *amici* to support this claim, rights conspicuously not enumerated in any provision of the Constitution, but grounded in expansive and undefined notions of "privacy" or "autonomy."

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 36 of the Rules of this Court, letters of consent from the parties have been filed with the Clerk of the Court.

[2] "Tr." denotes the transcript of the trial of this case before the Probate Division of the Circuit Court of Jasper County, Missouri on March 9-11, 1988. The full transcript of those proceedings is part of the record in this case.

The Missouri Supreme Court rejected the claim of Nancy Cruzan's co-guardians to withdraw food and fluids from their ward, concluding that the state's interest in the preservation of life outweighed the rights claimed to end her life. *Cruzan v. Harmon*, 760 S.W.2d 409, 426 (Mo. 1988). While we urge this Court to affirm the judgment of the Missouri Supreme Court, we do not believe that that result must be reached by a balancing test. Rather, the Petitioners' claims to "privacy" or "autonomy" must be rejected because they are not grounded in the Constitution. Claims of "privacy" or "autonomy" can no more justify killing Nancy Cruzan than they can excuse homicide in the "marital bedroom."

Indeed, the fact that Nancy Cruzan is not dying, and that useless or excessively burdensome treatment is not at issue here, underscores that it is the *life* of a particular disabled person—as opposed to some intrusive, demeaning technology—that is the burden to be avoided here. Under the principles of our law, human life cannot be taken without justification, and attributes over which an individual has no control, such as a disability, have never been understood to provide such a justification. Taking a life without justification is wrong whether that life is that of another or one's own. Put another way, the inalienable right to life is an unchallengable premise of our organic law. Claims of "privacy" and "autonomy" cannot wrench the Constitution into a mandate to an individual to waive, that is, to alienate, this right.

In essence, then, we do not urge this Court to affirm the Missouri Supreme Court because state interests outweigh those of an individual. In this case, not involving the choice of medical treatment or the cessation of useless treatment for a dying patient, our law does not recognize a "private" interest of Nancy Cruzan to end her life. "Quality of life" justifications for ending human life are fundamentally antithetical to the moral principles that underlie our constitutional order.

ARGUMENT

I. "PRIVACY" OR "AUTONOMY" PROVIDES NO MEANINGFUL JURIDICAL GUIDE TO A CLAIMED UNENUMERATED RIGHT TO END THE LIFE OF A DISABLED PERSON.

A. Petitioners Claim a Constitutional Right to Affirmatively End the Life of a Disabled Person Who Is Not Terminally Ill.

1. *The Fact That Nancy Cruzan Is Not Terminally Ill Distinguishes This Case From Precedents Governing the Choice of Medical Treatment.*

Early in its opinion, the Missouri Supreme Court made an observation crucial to the resolution of this case:

> [T]his is not a case in which we are asked to let someone die. Nancy is not dead. Nor is she terminally ill. This is a case in which we are asked to allow the medical profession to make Nancy die by starvation and dehydration. The debate here is thus not between life and death; it is between quality of life and death.

Cruzan, 760 S.W.2d at 412. This observation did not constitute a resolution of a disputed issue, for no one contended that Nancy Cruzan was dying. Briefs before this Court characterize her as being in a "persistent vegetative state," yet the record is far from clear that Nancy Cruzan is even in such a state.[3] One thing is certain: if

[3] "[T]here are currently no specific laboratory studies that unequivocally confirm the clinical diagnosis of the persistent vegetative state." American College of Physicians Br. at 6. Dr. Anita Isaacs, the Chief of the Rehabilitative Medicine Service at the Missouri Rehabilitation Center, where Ms. Cruzan resides, challenged this diagnosis, Tr. at 696, as did Dr. James Dexter, Chairman of the Department of Neurology at the University of Missouri, Tr. at 764, because Nancy Cruzan does respond to her environment in a limited way. Tr. at 696, 764.

Contrary to assertions that Nancy Cruzan is a "vegetable," Petitioners Br. at 15, who cannot "experience pain or suffering," American College of Physicians Br. at 5, Dr. Isaacs testified that she "probably has some cognitive function now." Tr. at 702. Nurses caring for Ms. Cruzan testified that she "responds to pain," Tr. at 372, and that her discomfort during her menstrual period was relieved by a dose of Tylenol. Tr. at 618. One of the Petitioners' own expert witnesses, Dr. James Davis, an osteopathic physician, testified that he did not know whether she feels pain. Tr. at 319-20. In describing the contracture of Ms. Cruzan's limbs, Dr. Davis went on to observe that "[t]hey can be straightened out, but it causes intense pain and discomfort to the patient. . . ." Tr. at 331.

the gastrostomy tube that is her sole source of food and fluids is removed, Nancy Cruzan *will* surely die, but of starvation and dehydration, not of the inevitable effects of some terminal disease.[4]

The Petitioners unmistakably wish to "choose the death" of their severely disabled, but not terminally ill, ward. *Cruzan*, 760 S.W.2d at 427. It more than misses the point to argue that this end would "honor" the "fundamental rights of incompetent persons," Petitioners Br. at 16, without confronting the extreme difference between this kind of killing and the more familiar applications of common law notions of informed consent and individual choice in the course of medical treatment. *E.g.*, *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972). It similarly avoids the gravamen of this case to claim a "right to decline life-prolonging medical treatment," American Medical Ass'n Br. at 24, without examining the particular situation of the individual patient which gives "life-prolonging" its real meaning—and so determines whether the claimed right falls into the familiar preserve of personal choice of medical treatment, or into a more radical realm of judicially sanctioned killing of the disabled.

[4] Dr. Dexter also testified that Ms. Cruzan would die "in pain and discomfort" if nutrition and hydration were withdrawn. Tr. at 774. *See also Brophy v. New England Sinai Hosp., Inc.*, 398 Mass 417, 497 N.E.2d 626, 641 & n.2 (1986) (Lynch, J., dissenting) ("The withdrawal of the provision of food and water is a particularly difficult, painful and gruesome death. . . . Paul Brophy's attending physician described death by dehydration as cruel and violent.").

If Nancy Cruzan were to seek to end her life by starvation, it would be considered suicide;[5] the "substituted judgment" of her co-guardians does not make it less a homicide and more a medical decision.

The situation of Nancy Cruzan is thus fundamentally different in kind, and not just degree, from the range of precedents broadly affirming rights to informed consent and choice of medical treatment. Such cases, though they often speak expansively of these rights, most commonly involve a terminally ill patient and treatment that "merely postpones the inevitable," *e.g.*, *Tune v. Walter Reed Army Medical Hosp.*, 602 F.Supp. 1452, 1453 (D.D.C. 1985), and we do not seek to challenge the moral and legal right to refuse "useless or excessively burdensome treatment."[6] Indeed, this right[7] can best be understood as ensuring that a patient has "a clear understanding of the risks and benefits of the proposed treatment alternatives or nontreatment, along with a full understanding of the nature of the disease and the prognosis."[8]

[5] When confronted with the case of a state prisoner who was starving himself because he could not "live fully" in prison, the New Hampshire Supreme Court made an observation directly relevant here:

> This is not a situation where an individual, facing death from a terminal illness, chooses to avoid extraordinary and heroic measures to prolong his life, albeit for a short duration. Rather, the defendant has set the death-producing agent in motion with the specific intent of causing his own death. . . .

In re Caulk, 125 N.H. 226, 480 A.2d 93, 97 (1984).

[6] May, Barry, Griese, *et al.*, *Feeding and Hydrating the Permanently Unconscious and Other Vulnerable Persons*, 3 Issues in Law and Medicine 203, 205 (1987). *See also* W. May, *Human Existence, Medicine and Ethics* 145 (1977) ("[A] human being has the right to refuse medical interventions that needlessly prolong the dying process and prevent him from dying his own death and from accepting, in a humanly free and dignified way, the end of his mortal existence."); Vatican Congregation for the Doctrine of the Faith, *Declaration on Euthanasia* (1980), *reprinted in Moral Responsibility in Prolonging Life Decisions* 290 (D. McCarthy & A. Moraczewski ed. 1981).

[7] A right to decline medical treatment of the kind we describe here has historically been recognized by the common law. *E.g.*, *In re Westchester Co. Medical Center*, 72 N.Y.2d 517, 531 N.E. 2d 607, 611 (1988). Though we question the correctness of some cases that have also held the right to be protected by the federal Constitution, *e.g.*, *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 677, 683 & n.11 (1986) (en banc), that issued need not be addressed in this case.

[8] Wanzer, *et al.*, *The Physician's Responsibility Toward Hopelessly Ill Patients*, 310 New Eng. J. Med. 955, 957 (1984), *quoted in Rasmussen*, 741 P.2d at 683.

No rights governing the choice of medical treatment can be stretched to encompass the kind of right to end human life sought here. Certainly the federal Constitution cannot be construed to guarantee such a right, and so sweep away the law's historic antagonism to suicide.[9]

2. *Though Food and Fluids Are Fundamentally Different From Medical Treatment, Whether They Are Characterized As "Treatment" Is Irrelevant To This Case.*

"[C]ommon sense tells us that food and water do not treat an illness, they maintain a life." *Cruzan*, 760 S.W.2d at 423. Karen Quinlan's father, when asked if he wanted his daughter's nasogastric feeding tube removed, replied, "Oh no. That is her nourishment."[10] Contradicting this common sense in hopes of stretching

[9] *E.g.*, *Von Holden v. Chapman*, 87 A.D.2d 66, 450 N.Y.S.2d 623, 625 (1982) ("To characterize a person's self-destructive acts as entitled to . . . Constitutional protection would be ludicrous."); *John F. Kennedy Memorial Hosp. v. Heston*, 58 N.J. 576, 279 A.2d 670, 672 (1971) ("There is no constitutional right to choose to die."). *See generally* Marzen, O'Dowd, Crone & Balch, *Suicide: A Constitutional Right?*, 24 Duq. L. Rev. 1, 100 (1985).

[10] Comment, *Hold On Courts: May a Comatose Patient Be Denied Food and Water*, 31 St. Louis U.L.J. 749, 758 (1987).

the caselaw governing consent to medical treatment to cover this case, the Petitioners and their *amici* unfailingly characterize the artificial provision of food and fluids as medical treatment, often apparently by equating any "intrusion" into the body as such treatment. *E.g.*, Petitioners Br. at 18-19.

Yet food and water simply do not serve the same function as medical treatment; they are "basic resources of the body," not techniques to cure a condition. That the differences between medical treatment and food and fluids are far from "symbolic" is illustrated by the dramatically different consequences of depriving a patient of them. Without food and water, a Karen Quinlan will without doubt starve and dehydrate to death. A respirator was removed from the real Karen Quinlan, and she lived for nine years. *Cruzan*, 760 S.W.2d at 413 n.6. Food and fluids represent the basic human care that we all need, while most of us manage to survive without renal dialysis or artificial respiratory support.[11]

Regardless whether one calls the provision of nutrition and hydration to Nancy Cruzan "treatment" or not, the consequences of withholding these necessities for a person who is not terminally ill underscore yet again that this case does not really share the underlying ethic of the jurisprudence of informed consent. The choice sought to be protected here does not focus on the treatment "'options available and the risks attendant upon each." *Canterbury v. Spence*, 464 F.2d at 780. That is, the judgment to be made is not whether "the *means used to preserve life* is useless or excessively burdensome".[12]

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[11] *See generally* Derr, *Nutrition and Hydration as Elective Therapy: Brophy and Jobes from an Ethical and Historical Perspective*, 2 Issues in Law and Medicine 25 (1986). No meaningful distinction can rest on the label of the "artificial" provision of food and fluids when all of us must be assisted in eating at some points, such as in infancy, and when we are all fed through a complex system of foodstuff production, preservation, transportation, and distribution. *Id.* at 35.

[12] W. May, *et al.*, *supra* note 6, at 208 (emphasis in original).

Rather, the question has become whether Nancy Cruzan's "*life* is useless or excessively burdensome": [13]

> Once intentional steps to cause death—rather than passive measures which permit the condition or disease to take its natural course—have been approved, the inescapable conclusion is that it is the *existence* of the disabled person which constitutes the undesirable condition.[14]

As we will show below, such a claim—to make, and act on, a judgment of the relative worth of a human life under the protection of the law—is inconsistent with the most basic premises of our constitutional order.

B. A Claim to "Privacy" or "Autonomy" Cannot Justify Ending the Life of Nancy Cruzan.

1. *Ending a Human Life Requires Justification to Be Lawful.*

Judge Blackmar, in dissent below, questioned the weight of the interest in preserving life by observing, "The very existence of capital punishment demonstrates a relativity of values by establishing the proposition that some lives are not worth preserving." *Cruzan*, 760 S.W.2d at 428-29 (Blackmar, J., dissenting). Yet the existence of the death penalty in our society, limited as it is to circumstances of the most grievous personal culpability, in truth demonstrates the fundamental importance we give to the preservation of human life. For example, in applying the Eighth Amendment, this Court has repeatedly sought the means of "distinguishing the most culpable and dangerous of murderers" for whom death may be an appropriate punishment. *Tison v. Arizona*, 107 S.Ct. 1676, 1687 (1987). *See also Coker v. Georgia*, 433 U.S.

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[13] *Id.* (emphasis in original).

[14] Destro, *Quality-of-Life Ethics and Constitutional Jurisprudence: The Demise of Natural Rights and Equal Protection for the Disabled and Incompetent*, 2 J. Contemp. Health L. & Pol. 71, 120 (1986) (emphasis in original).

584, 598 (1977) (holding death to be an excessive punishment for rape because "in terms of moral depravity and of the injury to the person and to the public, [rape] does not compare with murder, which does involve the unjustified taking of human life."). Thus, "we may be warranted in taking lives, but we are obliged to give the most compelling justifications when we claim to exercise that kind of awful franchise." [15]

Under this regime, it would be incoherent to make a moral judgment on, or impose punishment on, people for attributes or acts beyond their control. Holding someone responsible or liable without regard to their blameworthiness "would shock the moral sense of any civilized community." [16]

Moreover, the legal justification for an action does not change based on who the actor is. If something is wrong, "it is a matter of utter irrelevance if the wrong is inflicted by a person on himself." [17] Accordingly, it is un-

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[15] H. Arkes, *"Autonomy" and the "Quality of Life": The Dismantling of Moral Terms*, 2 Issues in Law and Medicine 421, 423 (1987). *See also Enmund v. Florida*, 458 U.S. 782, 798 (1982) (in a capital case, "individualized consideration" of the defendant's "culpability" required); *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding a statute making the status of narcotics addiction a crime to be unconstitutional because addiction "is apparently an illness which may be contracted innocently or involuntarily"). Killing a human being "without lawful justification or excuse" is a classic definition of criminal homicide. R. Perkins & R. Boyce, *Criminal Law* 57 (1982).

[16] O.W. Holmes, *The Common Law* 50 (1881).

[17] H. Arkes, *First Things: An Inquiry Into the First Principles of Morals and Justice* 172 (1986). Abraham Lincoln expressed the same principle in his debates with Stephen Douglas:

> When Judge Douglas says that whoever, or whatever community, wants slaves, they have a right to have them, he is perfectly logical if there is nothing wrong in the institution; but if you admit that it is wrong, he cannot logically say that anybody has a right to do a wrong.

3 *Collected Works of Abraham Lincoln* 256-57 (R. Basler ed. 1953).

lawful in the most basic sense to kill a human being without justification, including oneself. Even the most explicit written instructions from Nancy Cruzan to her doctors to end her life—as opposed to end treatment that was excessively burdensome or useless—could not be carried out without lawful justification. The Petitioners and their *amici* offer none.

2. *"Privacy" or "Autonomy" Has No Application Here That Can Justify Ending the Life of Nancy Cruzan.*

The justifications offered by the Petitioners and their *amici* to support a court order permitting the removal of Nancy Cruzan's gastrostomy tube all essentially devolve into a claim for "autonomy" or "privacy." *E.g.*, Petitioners Br. at 18-19; American Medical Ass'n Br. at 21. Autonomy is central to the dignity of a human being, to be sure, because it is only by virtue of our freedom that our actions are not predetermined, that we can reason about right and wrong and choose to act accordingly.[18] *See Morissette v. United States*, 342 U.S. 246, 250 (1952) ("[B]elief in freedom of the human will and a consequent ability and duty . . . to choose between good and evil" is "universal and persistent in mature systems of law."). Autonomy is an essential condition for the proposition, at the heart of our law, that we can be held accountable for our acts, but it provides no standard for judging whether those acts are justified. "We can never claim, in the name of our freedom or autonomy, a 'right' to harm others without justification." [19] Thus, the true "power of the autonomy principle in protecting vulnerable individuals," American Medical Ass'n Br. at 45, is to point out that Nancy Cruzan's disability, which

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[18] *See* J. Hall, *General Principles of Criminal Law* 415, 419 (1960).

[19] Arkes, *"Autonomy," supra* note 15, at 429.

she is powerless to affect, cannot justify starving her to death.

"Privacy," too, is hardly a relevant justification for taking Nancy Cruzan's life. The choice to kill another may be private, but the resulting homicide is not immune from criminal prosecution on that ground.[20]

The uncertain constitutional basis of any free-standing, unenumerated right to privacy underscores the inapplicability of that concept as a guide for this Court's judgment here. Though *Griswold v. Connecticut*, 381 U.S. 479 (1965), has at times been characterized as the origin of such a right, this Court's decisions since *Griswold* clearly indicate that *Griswold* is better understood as "the most important substantive due process decision of the modern period." [21] Most notably in *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), this Court noted that the interests with which *Griswold* and its progeny are concerned are secured by "the protections provided by the Due Process Clause." Just last term, in *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2341 (1989), the plurality opinion cited with favor Justice Harlan's concurring opinion in *Griswold*, in which he reiterated his view, first expressed in his famous dissent in *Poe v. Ullman*, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting), that the Due Process Clause protects the kinds of privacy interests at issue in *Griswold*. Indeed, Justice Goldberg's reliance on the Ninth Amendment, *Griswold*, 381 U.S. at 486-99 (Goldberg, J., concurring), has even been characterized as the

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[20] Indeed, taking a human life can never be a fully "private" matter since if it is viewed as legally justified, that justification logically must operate to excuse the homicide as a matter of the criminal law.

[21] L. Tribe, *American Constitutional Law* 775 (1988). *See also Developments in the Law: The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1161 (1980).

conversion of that Amendment into another vehicle for substantive due process.[22]

In addition, *Griswold* itself

> reveals strong interpretivist urges, struggling to relate its holding to the First, Third, Fourth, and Fifth Amendments, . . . making a special effort to connect up the Fourth by speculating on the methods by which the police would likely have to enforce the law at issue.[23]

Moreover, the *Griswold* Court took pains to emphasize that it was invalidating only the portion of the Connecticut law that prohibited the use of contraceptives, as opposed to their manufacture or sale. Consequently, *Griswold* ultimately comes to rest on the more traditional Fourth Amendment concern that "*enforcement* [of the Connecticut law] *would have been virtually impossible without* the most outrageous sort of government prying into the privacy of the home." [24]

Thus, *Griswold* demonstrates "a disposition *not* to enshrine anything that might be called a general right of privacy," [25] and should be read, instead, to embrace at the very most the classic substantive due process analysis that proceeds by identifying basic values "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). To be sure, *Roe v. Wade*, 410 U.S. 113, 154 (1973), was grounded on a free-standing right

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[22] *See* McDowell, *The Politics of Original Intention* (1989) (manuscript to be published by the American Enterprise Institute in *The Constitution, the Courts, and the Quest for Justice*, R. Goldwin & W. Shambra, ed.); G. McDowell, *Curbing the Courts: The Constitution and the Limits of Judicial Power* 111 (1988).

[23] J. Ely, *Democracy and Distrust* 221 n.4 (1980).

[24] Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 930 (1973) (emphasis in original).

[25] *Id.* at 928 (emphasis in original).

to privacy, but *Roe* marked a break from *Griswold* in this regard, for it did not—indeed, could not—ground this new privacy right to abortion in the constitutional text or the notion of "ordered liberty." [26]

The right claimed here—to affirmatively end a human life—can hardly be seen as "implicit in the concept of ordered liberty," *Palko*, 302 U.S. at 325, or "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion). Clearly, the substantive due process method of *Griswold* and its progeny hardly provides a "rational continuum" by which constitutional sanction can be given to such a radical right.

And *Roe*'s understanding of "privacy" or "autonomy" affords even less of a principled basis for decision in this case. This Court's sixteen-year sojourn through the constitutionalization of abortion aptly demonstrates that attempting to define the borders of an unenumerated right results in little more than continuing uncertainty and unseemly political machinations. *See Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 3064-66 (1989) (Scalia, J., concurring in part and concurring in the judgment); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). Even the *Roe* Court disavowed the notion that "one has an unlimited right to do with one's body as one pleases." 410 U.S. at 154.

The terms "privacy" or "autonomy" themselves have no inherent meaning useful in the task of judging. Although the Court could speak of the "right of every individual to the possession and control of his own person" in the case so often cited by the Petitioners and their *amici*, *Union Pacific Ry. v. Botsford*, 141 U.S. 250, 251

[26] *See* J. Ely, *supra* note 23, at 221 n.4 (The *Griswold* analysis "is quite different from the 'method' employed by the Burger Court in *Roe v. Wade*. . . .").

(1891), it could also approve compulsory vaccination, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and even the compulsory sterilization of the retarded. *Buck v. Bell*, 274 U.S. 200 (1927). One *amicus* has called *Buck* an aberration in this Court's fundamental rights jurisprudence. American College of Physicians Br. at 16 n.7. Quite the contrary, insofar as the Petitioners' case would base rights on a notion of "meaningful life," Petitioners' Br. at 16, their case is fully consistent with the ethic of *Buck* that would measure what a human being deserves by a physical or mental disability.[27]

In sum, claims of "privacy" or "autonomy" draw on no relevant precedents of this Court and provide no juridical guide that can lead this Court to take the radical step of giving constitutional protection to—and justify—affirmative actions to end human life.[28]

The arguments of the Petitioners must fail on the limits of "privacy" and "autonomy" alone. But in addition their claims cannot prevail because they are contradicted by a fundamental value that *is* enumerated in our constitutional order—the inalienable right to life.

II. BY VIRTUE OF THE FUNDAMENTAL, INALIENABLE RIGHT TO LIFE, NO ONE CAN HAVE A LEGALLY COGNIZABLE INTEREST OF THE KIND CLAIMED HERE TO END A HUMAN LIFE.

A. The Inalienable Right to Life Is Protected By the Constitution.

The Petitioners take pains to argue that their goal is fully consistent with what they understand Nancy Cruzan would want if she were capable of communicating

[27] *See* Destro, *supra* note 14, at 102-103, 109.

[28] *See* Arkes, *"Autonomy," supra* note 15, at 429-30 ("[I]f it is in principle wrong to visit punishment on people because of their race, we could not claim a right to inflict that punishment on ourselves, *even as an exercise in our autonomous governance of ourselves.*") (emphasis in original).

her desires. Petitioners Br. at 33-36. Such argument underscores what must be a basic premise of their case: that Nancy Cruzan, if competent, could choose to starve herself to death solely under a claim of "privacy" or "autonomy."

Such a claim is diametrically at odds with the most fundamental principle of our law, as expressed in the Declaration of Independence, that all men are endowed with an "inalienable" right to life simply because they are human beings. Indeed, the inalienability of these rights—the fact that "people cannot deprive themselves of these inherent rights" [29]—flows from the grounding of all rights in the nature of man.[30] If it is wrong to kill a human being without justification, this principle prevents a person from killing himself. We have no competence to alienate this right:

> To the extent that anything stands in the class of a wrong, it stands there only by virtue of a principle,

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[29] E. Dumbauld, *The Declaration of Independence and What It Means Today* 59 (1950). *See also* B. Bailyn, *The Ideological Origins of the American Revolution* 186 (1967).

[30] *See* M. White, *The Philosophy of the American Revolution* 165-67 (1978); M. Adler & W. Gorman, *The American Testament* 34 (1976) ("[C]ertain rights are inalienable . . . because they are inherent in the nature of man."); J. McClellan, *Joseph Story and the American Constitution* 67 (1971) (explaining Justice Story's understanding that the inalienable right to life results "from our very condition"); P. Sigmund, *Natural Law in Political Thought* 103-104 (1971); Destro, *supra* note 14, at 100 (natural rights flow simply from the attribute of being "genetically human").

We also subscribe to the proposition of the Framers that this nature is endowed by the Creator. *See generally* G. Amos, *Defending the Declaration* 35-74, 103-126 (1989). However, this proposition is not essential to the argument here, and we do not advance it so as to avoid any concern that affirming the Missouri Supreme Court requires "an endorsement of a religious tenet." *Webster v. Reproductive Health Services*, 109 S.Ct. at 3082 (Stevens, J., concurring in part and dissenting in part).

> and the validity of that principle is not suspended because a person becomes willing to inflict that wrong on himself.[31]

The common law has long reflected the inalienability of the right to life by "preclud[ing] any individual from licensing his own destruction." [32] *See, e.g., Martin v. Commonwealth*, 184 Va. 1009, 37 S.E.2d 43, 47 (1946) (consent is no excuse for homicide because the right to life is inalienable); *State v. Moore*, 25 Iowa 128, 135-36 (1868) ("The right to life and to personal safety is not only sacred in the estimation of the common law, but it is inalienable.").

That the inalienable right to life is fundamental and protected by the Constitution is beyond question. *Yick Wo. v. Hopkins*, 118 U.S. 356, 370 (1886) ("[T]he fundamental rights to life, liberty, and the pursuit of happiness . . . are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws . . . ."); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). The Declaration of Independence itself can be considered as having a constitutional status. *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324 (1893) (noting that the Bill of Rights

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[31] H. Arkes, *First Things, supra* note 17, at 172.

[32] Note, *Euthanasia: Criminal, Tort, Constitutional and Legislative Considerations*, 48 Notre Dame L. Rev. 1202, 1205 (1973). *See generally* Marzen, O'Dowd, Crane & Balch, *supra* note 9. The idea of individual rights expressed in the Declaration was, even at the close of the eighteenth century, part of an ancient heritage, being a "characteristic product of the great age of creative jurisprudence that, in the twelfth and thirteenth centuries, established the foundations of the Western legal tradition." Tiernev, *Villey, Ockham and the Origin of Individual Rights*, in *The Weightier Matters of the Law: Essays in Law and Religion* 31 (J. Witte & F. Alexander ed. 1988). *See also* G. Amos, *supra* note 30, at 103-126.

was adopted to protect "those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights"); *Gulf, Colorado & Santa Fe Ry v. Ellis*, 165 U.S. 150, 159-60 (1897); *McGowan v. Maryland*, 366 U.S. 420, 563 (1961) (Douglas, J., dissenting) ("[T]he body of the Constitution as well as the Bill of Rights enshrined those principles [of the Declaration]").[33]

Moreover, the notion of an inalienable right to life arising from the nature of man, and so constituting the essential ground of rights, is not some antique relic of our past, but a continuingly vital premise of our law. As Justice Brennan aptly put it in a now much-quoted phrase, human life embodies the "right to have rights," *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring), and so remains the foundation of our jurisprudence of rights. Even in a regime of liberty, neither the individual nor the state has the right to take actions inconsistent with the premises of that liberty.

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[33] *See also* J.Q. Adams, *The Jubilee of the Constitution* (1839), *reprinted in* 6 J. of Christian Juris. 1, 19 (1986) ("The Declaration of Independence and the Constitution of the United States, are parts of one consistent whole, founded upon one and the same theory of government. . . ."); E. Dumbauld, *The Bill of Rights and What It Means Today* viii (1957) ("[T]he American Bill of Rights . . . was the vehicle whereby the political philosophy of the Declaration of Independence was incorporated into the Constitution.").

Even in the enabling legislation enacted to provide for the transition of individual territories into states, Congress has required that the new state's constitution "shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557, 558 (New Mexico). *See also id.* at § 20, 36 Stat. at 509 (Arizona); Act of June 16, 1906, ch. 3335, § 3, 34 Stat. 267, 269 (Oklahoma); Act of Feb. 22, 1989, ch. 180, § 4, 25 Stat. 676, 677 (North Dakota, South Dakota, Montana, Washington); Act of April 19, 1864, ch. 59, § 4, 13 Stat. 47, 48 (Nebraska); Act of March 21, 1864, ch. 37, § 4, 13 Stat. 32, 33 (Colorado); Act of March 21, 1864, ch. 34, § 4, 13 Stat. 30, 31 (Nevada).

B. The Inalienability of Nancy Cruzan's Right to Life Bars This Court From Giving Any Legal Significance to a Claimed Private Interest to End That Life.

Contrary to the broad arguments of the Petitioners and their *amici*, the Missouri Supreme Court focused on the correct, far more precise, issue: "we are asked to allow the medical profession to make Nancy die by starvation and dehydration." *Cruzan*, 760 S.W.2d at 412. Reference to the long-standing American political and legal principle that human beings are endowed with a right to life that we cannot alienate yields a clear negative reply to this question.

The sole justification offered to deprive Nancy Cruzan of food and fluids, and so take her life, is her disability. Yet a physical disability is an attribute that a person is powerless to affect, and so cannot be a justification for taking life in any moral or legal sense that is coherent. We cannot point to a person's physical infirmities, anymore than we can point to a person's race or sex, as a basis for concluding that that person no longer deserves to live.

One can, of course, point to the "meaninglessness" of a disabled person's life, as do the Petitioners, Petitioners Br. at 16, as a supposed reason to end that life. Such efforts at justification starkly underscore that in this case—as opposed to the vast majority of cases dealing with choices in medical treatment—the undesirable condition is not an excruciatingly prolonged death or a burdensome, humiliating medical procedure. Rather, it is the continued life of Nancy Cruzan herself that is the circumstance to be avoided.[34] Thus the claim here is essentially circular; the only justification for ending this individual's life is that life. The Constitution simply cannot be used to legitimate a course so fundamentally at odds with the principle of the inalienable right to life.

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[34] *See* Destro, *supra* note 14, at 120.

Indeed, the Petitioners' claim strikes at the foundation of our whole edifice of individual rights and government by consent—the proposition that all liberty is a direct consequence of the nature of human beings as creatures with the capacity to choose between right and wrong.[35] The Petitioners' case is based on a radically different proposition, that persons should be "defined functionally —by what an individual can *do* or *feel*, rather than by reference to their nature: that is, what they *are*." [36]

The fact that Petitioners can offer no objective measure of the "meaningless" life unravels their case.[37] The very subjectivity of their argument brings home the practical benefit of the inalienability of the right to life.

For example, if we accept the notion that an individual's life could become so burdensome *to her* that she could justifiably end her life, we cannot avoid recognizing that this is her subjective judgment about the value of her life, both in the sense of her personal measure of value and in the sense that, being personal, she could change it at any time. Clearly, only a statement by this individual at the time her life would be ended could assure anyone that her life had no value to her at that time. Thus, no one could rely on even the most detailed prior expression—such as a "living will"—to justify end-

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[35] *See* J. Story, *Natural Law, reprinted in* J. McClellan, *supra* note 30, at 313 (Man has "the power of discerning between good and evil, and a liberty of choice in the use of those means. . . ."); H. Arkes, *First Things, supra* note 17, at 29-36 (Because human beings are by nature equally moral agents, no person can rule over another without his consent.).

[36] Destro, *supra* note 14, at 97 (emphasis in original).

[37] The very claim to be able to privately judge whose life is meaningless is at odds with the liberal political philosophy of the Framers. *See* Sherlock, *Liberalism, Public Policy and the Life Not Worth Living: Abraham Lincoln on Beneficent Euthanasia*, 26 Am. J. Juris. 47, 52-53 (1981).

ing a life. Even by a "meaningfulness" measure, then, Nancy Cruzan's right to life must be seen as inalienable as a practical matter because her disability makes it impossible for anyone to reliably know her private opinion at this time. "Substituted judgment" can only mean that someone else has concluded that Nancy Cruzan's life is meaningless.

Put another way, if, as is argued in this case, the Constitution protects the right of a person who is not terminally ill to affirmatively end her life, and this right survives incompetence to let a third party exercise such substituted judgment, then this Court is being asked to endorse "suicide by substituted judgment—constitutionally sanctioned active, involuntary euthanasia—of incompetent persons." [38] One does not even need to reflect on the horrors of the twentieth century [39] to realize that such concerns are hardly far-fetched. For example, Glanville Williams has suggested that "[i]t may, indeed, be that mankind will one day have to revise its present ethics of keeping people alive. It is increasingly common

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[38] Marzen, O'Dowd, Crone & Balch, *supra* note 9, at 102. The claim of the Petitioners here must also be examined in light of their status as the parents and the guardians of Nancy Cruzan, since they have a duty to "[a]ssure that the ward receives medical care and other services that are needed" and to "[p]romote and protect the care, comfort, safety, health and welfare of the ward." Mo. Rev. Stat. § 475.120.3 (1986). *See also In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 73, *cert. denied*, 454 US. 858 (1981) ("The parent . . . may not deprive a child of life saving treatment, however well intentioned. . . .").

[39] *See* Alexander, *Medical Science Under Dictatorship*, 241 New Eng. J. Med. 39 (1949). Dr. Alexander chronicles the efforts to undermine "the traditional compassionate nineteenth-century attitudes toward the chronically ill" in Germany even before the Nazi regime came to power, *id.* at 39, leading to the killing of "the mentally defective, psychotics (particularly schizophrenics), epileptics and patients suffering from infirmities of old age and from various neuralgic disorders such an infantile paralysis, Parkinsonism, multiple sclerosis and brain tumors." *Id.* at 40.

for men and women to reach an age of 'second childishness and mere oblivion,' with a loss of almost all adult faculties except that of digestion." [40] Similarly, a state legislator testified before the United States Senate in support of legalized euthanasia and questioned the "benefit" of the lives of 1500 retarded individuals in his state's mental institutions, individuals "who never had a rational thought." [41]

In sum, to authorize the death by starvation of an incompetent and dependent ward who is not terminally ill opens a door to a dark future, redolent of a sinister past,[42] by challenging what has been for our liberal constitutional order a necessarily closed question [43]—the inalienability of the right to life. This effort does not have, and cannot be given, the imprimatur of our Constitution, or of the morality on which it rests.

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[40] G. Williams, *The Sanctity of Life and the Criminal Law* 347 (1957).

[41] Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250, 1330 (1975).

[42] *See* Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 Minn. L. Rev. L. Rev. 969, 1030-36 (1958).

[43] *See* Kendall, *The "Open Society" and Its Fallacies*, 54 Am. Pol. Sci. Rev. 972, 978 (1960) (explaining that even in a liberal political regime certain questions must remain "closed," for to entertain them is to question the liberal principles of the regime, and so the regime itself).

CONCLUSION

For the foregoing reasons, the decision of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

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